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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. C 10-3561 WHA
	)	
GOOGLE, INC.,	)	
	)	
Defendant.	)	San Francisco, California
	)	November 19, 2015

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Official Reporter - U.S. District Court

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P R O C E E D I N G S

NOVEMBER 19, 2015 8:44 A.M.

THE COURT: We'll go to Oracle v. Google. Case number 10-3561. Let's have our appearances.

MR. BICKS: Good morning, Your Honor. Peter Bicks from Oracle. And consistent with your court's order, I want to introduce Matt Bush, who's been with Oracle for a year after completing clerkships and graduating from University of Pennsylvania Law School. So I'll turn it over --

THE COURT: Welcome to you.

MR. BICKS: -- to Mr. Bush.

Thank you.

THE COURT: All right. Mr. Bush, welcome.

MR. BUSH: Thank you.

THE COURT: And?

MR. VAN NEST: Good morning, Your Honor. Bob Van Nest and Dan Purcell from Keker & Van Nest. And we're ready to proceed.

THE COURT: Thank you.

And?

MR. COOPER: Good morning, Your Honor. John Cooper on behalf of Dr. Kearl. I'd like to introduce Winston Liaw, who doesn't meet the four-year criteria but does meet the five-year criteria. And Dr. Kearl is in the courtroom.

THE COURT: Welcome to all of you. All right. Five

years I can handle. Thank you.

Let's hear from the moving party.

MR. BUSH: Thank you, Your Honor. Matthew Bush on behalf of Oracle.

Dr. Kearl should not serve as a neutral expert in this case. The question that's at the heart of this motion is, what standard of neutrality should a Rule 706 expert be held to?

And the answer is that an expert should not serve in the special neutral role when there's an appearance of impropriety. And Dr. Kearl's work in ***Apple v. Samsung*** raises an appearance of impropriety because he was on the Android team. And that's for three main reasons:

First, it was Android software that Apple accused of infringing its products. Second, Google was intimately involved in the case and had control and authority over the defense. And, third, Dr. Kearl's analysis was used to aid in that defense.

So taking the first point, Android's involvement in the case. Even though Samsung was the named defendant, the patents at issue involved software that was on Google's Android, not hardware that was on Samsung's equipment.

That's why Samsung told the jury in their opening statement, over and over again, that the case was an attack on Android. A direct quote just one of the times was, "It's an attack on Android. It's an attack. It's an attack." And

objection's overruled. "It's the truth. It's an attack on Android." They're saying it over and over.

And Google never disputes that the case is an attack on Android. They complain that we're just parroting back Apple's arguments in opening statements. But when we relate to the Court what Samsung's arguments are, Google is tellingly silent.

Google never disputes the case was an attack on Android and that it was Android's software that was at the heart of the defense. And because it was perceived as an attack on Android, Google wasn't just going to let anybody handle the defense. They agreed to indemnity Samsung, and had authority and control over at least part of the defense.

Google admits as much in Footnote 1 of their response, that they agreed to indemnify Samsung and direct Samsung's defense for at least part of these patents.

The Google-Samsung connection was so strong that the same attorneys represented both Google and Samsung. Not just the same law firm. The same attorneys. Everybody who --

THE COURT: What was the name of that firm?

MR. BUSH: It was Quinn Emanuel, Your Honor.

And every attorney who entered an appearance on behalf of Google also entered an appearance on behalf of Samsung.

Now, Google and Dr. Kearl try to say that this connection to Google doesn't really matter because Dr. Kearl's analysis dealt with Samsung's counterclaims against Apple. But that's

really just trying to parse offense and defense too finely.

It's like a wide receiver saying, well, I'm on offense, so I don't care at all how many sacks the defensive lineman gets because he's on defense, and he's completely separate from me. But they're not separate. They're all on the same team.

And in this case, Dr. Kearl was on the Android team. And more than that, they have the same coach. In this case, that coach was Google.

Google was controlling this litigation. It was a major case handled by a major law firm. They were going to ensure that all their arguments, both their defenses and their counterclaims, meshed into a single cohesive strategy. They weren't going to let a $6 million counterclaim potentially interfere with a $2 billion claim against them.

And the fact that the same attorneys were representing both Google and Samsung mean that they had a duty to ensure that all their arguments were in Google's best interests.

Even if this difference between offense and defense matters, Dr. Kearl's analysis was used as part of the defense. Apple was asserting an over $2 billion claim against Samsung. And Samsung responded by offering Dr. Kearl's $6 million analysis to show that all the patents in the smart phone space aren't really worth that much.

And you don't have to take Apple's word for it. And you don't have to take my word for it. You just have to see what

Samsung said in their opening statement to the jury. This is on page 413. They say:

"These types of features aren't worth hundreds of millions of dollars. They don't make a significant difference in sales. They have very limited value. In this case, Dr. Kearl determined that that was $6.78 million."

So what the Samsung-Google team is doing is, they're saying that all these features -- both Apple's claims against them and Samsung's own counterclaims -- all have a very limited value; that Apple's claims for $2 billion are far too high; they should be lower. And, as proof of that, they're offering Dr. Kearl's analysis.

Samsung's -- Samsung's offense was also Google's defense in this case. And that's why Apple asked the jury, "Why pay $5 million to defend a $6 million claim?"

But it's even worse than that, Your Honor. One of the patents Dr. Kearl concluded was worth only $158,000. And even after finding out that was what one of the patents was worth, Samsung and Google brought that counterclaim all the way through a full trial.

The only reason to spend that much money and time and expense bringing a $158,000 counterclaim in a $2 billion case, for a company like Google and Samsung, is to offer this strategy of saying these patents and smartphones aren't really

worth that much.

And because Dr. Kearl was part of this defense, one of the defenses that he found himself aligned with was this idea that Google's engineers were so skilled that they would never copy. That's basically what Samsung told the jury in that case.

But Google's copying, rather than creating the APIs entirely from scratch, is at the heart of this case. And we're finding out, now, that Google didn't only copy just once, but that they're continuing to copy as new versions of Java come out.

So Java 5 was at issue in the first trial. When Java 6 comes out, we're finding parts of Java 6 are matching in new versions of Android. And then when Java 7 comes out with new features, Google is copying those features into its newer version of Android then.

So it's not appropriate for Dr. Kearl to have been aligned with this defense that Google would never copy, in a case where Google's copying was so central to the case here.

And for a normal expert or a normal witness -- not a court-appointed witness -- we could just cross-examine the witness on any of these issues of connection to Google or these appearance of impropriety. But Dr. Kearl's special role as a neutral expert if not completely prevents us from doing that at least makes it extremely difficult.

I think everybody agrees that a court appointment carries

with it a powerful stamp of Court approval. Those are Google's words. "A powerful stamp of Court approval."

And we see that being used in the Samsung case. Samsung tells the jury that one of the reasons Dr. Kearl was reliable is because he was a court-appointed expert here. Not just that he was a court-appointed expert in that case, but that he was a court-appointed expert in this case, so that the Samsung jury could trust that he was reliable.

So our two options are to raise this issue of Dr. Kearl being part of the Android team with the jury. But that risks suggesting to the jury that the Court has some approval of the Android team.

Or we could take Google's suggestion, which is just to not raise the issue at all. But that means we wouldn't be able to cross-examine him like we could any normal witness or any normal party expert.

Your Honor wanted an expert who was unimpeachable and had no conflicts. And Dr. Kearl's work in *Apple vs. Samsung* opened up an avenue of impeachment.

In the first trial, the parties searched for an expert that both sides would find acceptable. Google rejected some experts on the ground that they were too connected to Sun and Oracle. And we rejected other experts on the ground that they were too connected to Google. We never would have agreed to Dr. Kearl had he worked on Apple v. Samsung at the time.

Of all the possible experts in the country, there shouldn't be an expert with this close ties to not only Google but Google's Android.

And if we want to judge what is the standard of neutrality, it should be what kind of expert -- which expert would both parties have agreed to, Your Honor.

And Dr. Kearl, had he worked on this case at the time, we just never would have agreed to him. We would have picked someone who doesn't have these complications. These complications are just not necessary to have in this case.

And if Your Honor chooses that Dr. Kearl should no longer serve as a neutral expert, then there is no need to replace him with anybody else.

The best way to get at the truth here is to have two sides presenting their strongest arguments. That's how the adversary process works.

As Judge Kozinski said in *Thompson*:

> "Proceedings where the judge takes an active role in ferreting out the truth are decidedly alien to our way of thinking."

Rule 706 is an exception to this general way of doing things because it's an extension of the Court taking an active role in ferreting out the truth.

THE COURT: The rule is in there. You're arguing against the rule.

MR. BUSH: Your Honor --

THE COURT: Why don't you go to the Advisory Committee and get it taken out?

MR. BUSH: We can try that, Your Honor. But the rule is still an exception to the adversary process. And because of that --

THE COURT: Yes, of course it is. In all these years, I've never done it.

But you know what? This is an exceptional case where massively complicated damages issues are being raised by your side and the other side. And a jury needs some assistance to help sort it out.

I've sat through too many trials where the jury -- somebody tries to buffalo the jury and trick the jury through the adversary process. That's the problem.

If this was a simple case or even a moderately complex case, I would agree with you. But this is not such a case.

MR. BUSH: Well, we understand that Your Honor felt that way.

THE COURT: So even if I agreed with you -- and let's hypothetically say I agreed with you and knocked out Dr. Kearl. We would delay this case 18 months while we brought in another expert, because we're going to have an independent expert under Rule 706, very likely.

I'm going to keep -- when I actually see the damages

studies, and if I am shocked and find that they are simple enough, then we don't need an expert, an independent expert. But my hunch is that I will not be shocked; that I will be dismayed. It will be so complicated that I can't even understand it. And I doubt that you and your team would understand it or maybe even the experts would understand it because it's a ghostwritten thing by the lawyers.

I don't know. Don't get me started on this.

(Laughter)

THE COURT: I'm just telling you this is -- in 16 years, I've never done it. This is the first time. And I feel like there's good reason that I did it. And I'm going to wait and see.

So if you want to put the trial off until 2020 or 2019, maybe that's what you're going to get. Meanwhile, Google goes on; Android goes on; no trial occurs because you don't want to have an independent person come in and say to the jury, "Here's my own assessment."

I will tell the jury that they've got to -- I don't agree with you that there's -- I'll give whatever the Appellate Courts say is the right admonition to the jury as to how much weight to give it, and not give it any special weight on account of the judge having appointed the person.

MR. BUSH: Well, Your Honor, I'm not going to fight you too strongly on this idea of waiting until we see the

expert reports. I think --

THE COURT: I should do that. Because I could be wrong, and it could be simple enough that the adversary process will play out in the normal way. But if I just give up on it altogether, then I won't even have the option.

MR. BUSH: I understand, Your Honor. And we have no objection to waiting to see the expert reports.

And the only point I want to make -- because I see how Your Honor is thinking about it -- is only that we're seeing Google's revenue numbers now. And Your Honor has seen from our last submission that Google is making a lot of money with our technology in their phones. They are very profitable. Android is very popular. They are making billions of dollars. And we are entitled to infringer's profits. So just because our damages request may end up being billions of dollars does not necessarily make it extreme or unreasonable or complicated.

But I understand Your Honor's position to wait to see the damages report.

THE COURT: The last hearing we were here on, which I ruled totally in your favor and against Google, was whether -- you had a very complicated argument about you needed all of the financial statements, the internal financial statements, everything that the -- whether it was certified or not, all that internal stuff that every manager in Google got to see so that you could go through there and construct an argument about

what the proper deduct should be from the profits.

And I gave you every scrap of paper that you asked for. But as I walked off the bench I said, you know, these things are going to be so complicated; they are going to be 150 pages long; and all of those financial statements are going to be -- they're going to be quoting from -- flyspecking them, trying to pick some little piece out of one that supports it; and it's going to be such a hard project. And I said, you know, if that's the way it turns out, it's a good thing we've got an independent expert to help me sort that through.

I'm going to need some help, I think. But, certainly, the jury is going to need some help.

So, you know, you can't have it both ways. You can't construct this thing: "Oh, we may go for statutory; oh, we may go for actual; oh, we've got to get the financial statements; oh, it's going to be complicated beyond belief, and they are robbing us blind," and then think it's going to be simple and the adversary system can handle this.

I don't know. Conceivably, but I doubt it.

So there's a have-it-both-ways aspect to what you're trying to do here.

Now, the points that you make about Dr. Kearl with that other case, that's separate. That's separate. And I've got to give consideration to that point. But on whether or not we should have an independent expert I -- this is a very strong

candidate for an independent expert.

I need to hear from the other side. I'll give you a few moments of rebuttal in a moment.

MR. BUSH: Thank you, Your Honor.

THE COURT: May I hear, first, from the main accused person who is Dr. Kearl's lawyer. I would like to hear from Dr. Kearl's lawyer next.

MR. LIAW: Thank you, Your Honor.

THE COURT: Please come up here. I can't hear you way back there. Your name again?

MR. LIAW: Thank you, Your Honor. Winston Liaw.

Dr. Kearl does not have an adversarial position with respect to Oracle or Google in this matter. As the Court's --

THE COURT: But come to grips with the argument that's being made, which is that in the Apple case, Apple sued Samsung, which uses the Android. And your company -- not your company but Google paid for part of the Apple -- was allied with Samsung in some way and had an indemnity agreement on part of the Apple claims.

So that, really, the argument is that that case was a proxy for suing Google. Apple v. Google, I guess. It wasn't informed, but maybe partly in substance is the argument. So, therefore, Dr. Kearl took advantage of the fact that I had appointed him as an independent expert in this case and sold himself on that basis to the jury.

So what do you say?

MR. LIAW: Dr. Kearl had a very limited role in the *Apple v. Samsung* matter.

First, he was retained by Samsung. Not Google. He examined -- his role --

THE COURT: Did Google in any way ever see any of the draft reports or help draft reports?

Was Google in the background helping in any way, through their lawyers or in any other way, what Dr. Kearl did in that case?

MR. LIAW: From my understanding, Dr. Kearl did never -- did not confer with Google at any point.

THE COURT: Well, did somebody from Google confer with somebody from Android -- I'm sorry, from Samsung, who in turn, through the ghostwriting process that the lawyers do, somehow influence what Dr. Kearl said?

MR. LIAW: I'm not aware.

THE COURT: Okay.

MR. LIAW: So he had a very limited role. As I mentioned, he was retained by Samsung. He looked at Apple products, not any Android or Google products. And --

THE COURT: Well, here's the argument. That's true. That's a good point for your side. But the way it was presented, it was used, in part, as a shield to say, "Look at these gigantic numbers that Apple wants in their damage study.

We're going to show you what a real expert would do and how a real expert values a patent. And that's Dr. Kearl. And he's going to show you that those Apple numbers can't be trusted because -- on our own patents."

So in some indirect way, not a direct way, but an indirect way his study got used against Apple.

True? Seems like that's true.

MR. LIAW: I think what's -- Dr. Kearl did not have input on the strategy portion of the case. So I think to the extent any position is taken by Samsung or Google and imputing them on Dr. Kearl, I think it would be a bit unfair.

THE COURT: All right. All right. What else would you like to say?

MR. LIAW: So I want to emphasize that we do not have an adversarial position here with respect to Oracle or Google. And, really, our primary role here is to make sure that the facts are accurately represented.

THE COURT: Well, that is my interest. I don't want an advocate for either side. I want somebody who is professionally pure, that will help the jury.

Okay. Thank you. Let's hear from Google.

MR. PURCELL: Briefly, Your Honor, to address the question that you posed to Mr. Liaw. Google had no involvement with Dr. Kearl or his report. There is no one from Google who was ghostwriting Dr. Kearl's report through communications with

Samsung.

THE COURT: Including your firm?

MR. PURCELL: Including our firm. Certainly including our firm. Nobody from our firm had any involvement in Apple-Samsung. Dr. Kearl's work was entirely focused on Samsung's counterclaims.

And I do want to rebut something that Oracle said. They said that Google was directing the litigation, was in control of the litigation for Samsung. That's completely false.

Google had involvement with part of Samsung's defensive case against Apple. There were a certain number of patents where Google agreed to fund the defense and did participate in the strategy. Not all of Samsung's defense.

But Google didn't participate at all or fund anything having to do with Samsung's affirmative counter case against Apple.

THE COURT: When you say that, let's make sure -- I think I understand you. But when you say that Google had a limited role on those patents, does that include your firm?

MR. PURCELL: It does not include our firm.

THE COURT: In other words, your firm had nothing to do with that case?

MR. PURCELL: Our firm had nothing to do with that case.

Google agreed to defend and participate in the strategy

with respect to some of the patents that Apple asserted against Samsung.

And to be clear, they never agreed to indemnity a damages award. They agreed to pay for the defense costs. And that was the extent of it.

And I really don't have anything further to add. Our position has always been that the Rule 706 expert decision is up to the Court. And we're willing to live with what the Court decides.

THE COURT: Thank you.

Rebuttal.

MR. BUSH: Your Honor, just briefly.

I just want to -- Google's counsel just said that they were not directing the defense. I just want to refer Your Honor to Footnote 1 of Google's response, where they say that they did make an agreement to direct Samsung's defense; although, admittedly, for only some of the patents.

Just to read the full quote, it says:

"Oracle's assertion that Google agreed to indemnify Samsung and direct Samsung's defense is deliberately misleading."

As Oracle's evidence shows, Google made this agreement as to and participated in only Samsung's defense of certain counterclaims. They're saying they didn't make this agreement to indemnify and direct Samsung's defense, although they are

parsing their role --

THE COURT: I thought that Google helped on the -- some of the patents asserted by Apple against Samsung. But Dr. Kearl had no comments on that part of the case. Dr. Kearl was commenting on Samsung's countersuit -- right? -- for its own patents against Apple.

MR. BUSH: I think this idea of parsing the roles, both in particular patents and between the offense and defense, is just not plausible considering the same attorneys represented both sides.

I'm trying to picture a meeting where they're deciding deciding on the strategy for some patents, the other patents and their counterclaims. And the lawyers first discuss their strategy for one patent with their Google hats on; and then they stop and take off and put on their Samsung hats and discuss the rest of the patents; and then put on their offense hats for discussing the counterclaims.

This was a single cohesive strategy. As I said earlier, there was just no way they were going to let these counterclaims for $158,000 for one, and 6 million total, interfere with their defense of the $2 billion claim.

This was all one strategy. And Google was directing part of the defense. And under that circumstance and the fact that Dr. Kearl found himself part of the Android team, it's not appropriate for him to serve in this special neutral role here.

As Your Honor said, he ends up finding himself in a situation where he's not professorially pure.

And the only other point I wanted to respond to is, counsel for Dr. Kearl said that he had a limited role in *Apple v. Samsung*.

THE COURT: I did not say that he was -- I say that that's what our goal is. But I did not say that he was not professionally pure.

MR. BUSH: I'm sorry, Your Honor. I did not mean to suggest that. I meant to say that --

THE COURT: Let's be clear that -- I appreciate your arguments, but it doesn't necessarily equate to he's not professionally pure for purposes of our case.

MR. BUSH: Your Honor, I wasn't trying to impute your assessment of Dr. Kearl.

THE COURT: I just want to be clear. And you didn't -- maybe I misunderstood. All right.

MR. BUSH: I was only saying, to just agree with Your Honor, that the goal was to find someone professionally pure; and that we should just have someone that doesn't have these complications; and that Dr. Kearl did not have a limited role in *Apple v. Samsung*. He was a testifying witness who is featured in both the opening and closing statements.

And, frankly, this was a very clever strategy on the Samsung-Google side. It's one thing to just say, "Well, we

don't want to pay Apple $2 billion. That's a lot of money. We don't want to pay it." It's quite another to then say, "Look, our counterclaims we're not even asking for that much." It's a powerful strategy.

And Dr. Kearl's being featured in the closing and opening statements means that he didn't have a limited role. He had a very important role in the case.

THE COURT: All right. Thank you.

MR. BUSH: Thank you, Your Honor.

THE COURT: Under submission. Thank you all.

MR. PURCELL: Thank you, Your Honor.

(At 9:09 a.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, November 20, 2015

Katherine Sullivan

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter